

WORKERS' COMPENSATION AND UNINCORPORATED ENTITIES AMENDMENTS

2011 THIRD SPECIAL SESSION

STATE OF UTAH

Chief Sponsor: Michael T. Morley

Senate Sponsor: Karen Mayne

LONG TITLE

Committee Note:

The Business and Labor Interim Committee recommended this bill.

General Description:

This bill amends the Workers' Compensation Act to address workers' compensation requirements for unincorporated entities.

Highlighted Provisions:

This bill:

- ▶ addresses workers' compensation coverage requirements for unincorporated entities;
- and
- ▶ makes technical and conforming amendments.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.

This bill provides retrospective operation to July 1, 2011.

Utah Code Sections Affected:

AMENDS:

34A-2-103, as last amended by Laws of Utah 2011, Chapters 328 and 413



28 *Be it enacted by the Legislature of the state of Utah:*

29 Section 1. Section **34A-2-103** is amended to read:

30 **34A-2-103. Employers enumerated and defined -- Regularly employed --**
31 **Statutory employers.**

32 (1) (a) The state, and each county, city, town, and school district in the state are
33 considered employers under this chapter and Chapter 3, Utah Occupational Disease Act.

34 (b) For the purposes of the exclusive remedy in this chapter and Chapter 3, Utah
35 Occupational Disease Act prescribed in Sections 34A-2-105 and 34A-3-102, the state is
36 considered to be a single employer and includes any office, department, agency, authority,
37 commission, board, institution, hospital, college, university, or other instrumentality of the
38 state.

39 (2) (a) Except as provided in Subsection (4), each person, including each public utility
40 and each independent contractor, who regularly employs one or more workers or operatives in
41 the same business, or in or about the same establishment, under any contract of hire, express or
42 implied, oral or written, is considered an employer under this chapter and Chapter 3, Utah
43 Occupational Disease Act.

44 (b) As used in this Subsection (2):

45 (i) "Independent contractor" means any person engaged in the performance of any work
46 for another who, while so engaged, is:

47 (A) independent of the employer in all that pertains to the execution of the work;

48 (B) not subject to the routine rule or control of the employer;

49 (C) engaged only in the performance of a definite job or piece of work; and

50 (D) subordinate to the employer only in effecting a result in accordance with the
51 employer's design.

52 (ii) "Regularly" includes all employments in the usual course of the trade, business,
53 profession, or occupation of the employer, whether continuous throughout the year or for only a
54 portion of the year.

55 (3) (a) The client under a professional employer organization agreement regulated
56 under Title 31A, Chapter 40, Professional Employer Organization Licensing Act:

57 (i) is considered the employer of a covered employee; and

58 (ii) subject to Section 31A-40-209, shall secure workers' compensation benefits for a

59 covered employee by complying with Subsection 34A-2-201(1) or (2) and commission rules.

60 (b) The division shall promptly inform the Insurance Department if the division has
61 reason to believe that a professional employer organization is not in compliance with
62 Subsection 34A-2-201(1) or (2) and commission rules.

63 (4) A domestic employer who does not employ one employee or more than one
64 employee at least 40 hours per week is not considered an employer under this chapter and
65 Chapter 3, Utah Occupational Disease Act.

66 (5) (a) As used in this Subsection (5):

67 (i) (A) "agricultural employer" means a person who employs agricultural labor as
68 defined in Subsections 35A-4-206(1) and (2) and does not include employment as provided in
69 Subsection 35A-4-206(3); and

70 (B) notwithstanding Subsection (5)(a)(i)(A), only for purposes of determining who is a
71 member of the employer's immediate family under Subsection (5)(a)(ii), if the agricultural
72 employer is a corporation, partnership, or other business entity, "agricultural employer" means
73 an officer, director, or partner of the business entity;

74 (ii) "employer's immediate family" means:

75 (A) an agricultural employer's:

76 (I) spouse;

77 (II) grandparent;

78 (III) parent;

79 (IV) sibling;

80 (V) child;

81 (VI) grandchild;

82 (VII) nephew; or

83 (VIII) niece;

84 (B) a spouse of any person provided in Subsection (5)(a)(ii)(A)(II) through (VIII); or

85 (C) an individual who is similar to those listed in Subsections (5)(a)(ii)(A) or (B) as
86 defined by rules of the commission; and

87 (iii) "nonimmediate family" means a person who is not a member of the employer's
88 immediate family.

89 (b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an

90 agricultural employer is not considered an employer of a member of the employer's immediate
91 family.

92 (c) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
93 agricultural employer is not considered an employer of a nonimmediate family employee if:

94 (i) for the previous calendar year the agricultural employer's total annual payroll for all
95 nonimmediate family employees was less than \$8,000; or

96 (ii) (A) for the previous calendar year the agricultural employer's total annual payroll
97 for all nonimmediate family employees was equal to or greater than \$8,000 but less than
98 \$50,000; and

99 (B) the agricultural employer maintains insurance that covers job-related injuries of the
100 employer's nonimmediate family employees in at least the following amounts:

101 (I) \$300,000 liability insurance, as defined in Section 31A-1-301; and

102 (II) \$5,000 for health care benefits similar to benefits under health care insurance as
103 defined in Section 31A-1-301.

104 (d) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
105 agricultural employer is considered an employer of a nonimmediate family employee if:

106 (i) for the previous calendar year the agricultural employer's total annual payroll for all
107 nonimmediate family employees is equal to or greater than \$50,000; or

108 (ii) (A) for the previous year the agricultural employer's total payroll for nonimmediate
109 family employees was equal to or exceeds \$8,000 but is less than \$50,000; and

110 (B) the agricultural employer fails to maintain the insurance required under Subsection
111 (5)(c)(ii)(B).

112 (6) An employer of agricultural laborers or domestic servants who is not considered an
113 employer under this chapter and Chapter 3, Utah Occupational Disease Act, may come under
114 this chapter and Chapter 3, Utah Occupational Disease Act, by complying with:

115 (a) this chapter and Chapter 3, Utah Occupational Disease Act; and

116 (b) the rules of the commission.

117 (7) (a) (i) As used in this Subsection (7)(a), "employer" includes any of the following
118 persons that procures work to be done by a contractor notwithstanding whether or not the
119 person directly employs a person:

120 (A) a sole proprietorship;

- 121 (B) a corporation;
- 122 (C) a partnership;
- 123 (D) a limited liability company; or
- 124 (E) a person similar to one described in Subsections (7)(a)(i)(A) through (D).

125 (ii) If an employer procures any work to be done wholly or in part for the employer by
126 a contractor over whose work the employer retains supervision or control, and this work is a
127 part or process in the trade or business of the employer, the contractor, all persons employed by
128 the contractor, all subcontractors under the contractor, and all persons employed by any of
129 these subcontractors, are considered employees of the original employer for the purposes of
130 this chapter and Chapter 3, Utah Occupational Disease Act.

131 (b) Any person who is engaged in constructing, improving, repairing, or remodelling a
132 residence that the person owns or is in the process of acquiring as the person's personal
133 residence may not be considered an employee or employer solely by operation of Subsection
134 (7)(a).

135 (c) A partner in a partnership or an owner of a sole proprietorship is not considered an
136 employee under Subsection (7)(a) if the employer who procures work to be done by the
137 partnership or sole proprietorship obtains and relies on either:

138 (i) a valid certification of the partnership's or sole proprietorship's compliance with
139 Section 34A-2-201 indicating that the partnership or sole proprietorship secured the payment of
140 workers' compensation benefits pursuant to Section 34A-2-201; or

141 (ii) if a partnership or sole proprietorship with no employees other than a partner of the
142 partnership or owner of the sole proprietorship, a workers' compensation coverage waiver
143 issued by an insurer pursuant to Part 10, Workers' Compensation Coverage Waivers Act,
144 stating that:

145 (A) the partnership or sole proprietorship is customarily engaged in an independently
146 established trade, occupation, profession, or business; and

147 (B) the partner or owner personally waives the partner's or owner's entitlement to the
148 benefits of this chapter and Chapter 3, Utah Occupational Disease Act, in the operation of the
149 partnership or sole proprietorship.

150 (d) A director or officer of a corporation is not considered an employee under
151 Subsection (7)(a) if the director or officer is excluded from coverage under Subsection

152 34A-2-104(4).

153 (e) A contractor or subcontractor is not an employee of the employer under Subsection
154 (7)(a), if the employer who procures work to be done by the contractor or subcontractor obtains
155 and relies on either:

156 (i) a valid certification of the contractor's or subcontractor's compliance with Section
157 34A-2-201; or

158 (ii) if a partnership, corporation, or sole proprietorship with no employees other than a
159 partner of the partnership, officer of the corporation, or owner of the sole proprietorship, a
160 workers' compensation coverage waiver issued by an insurer pursuant to Part 10, Workers'
161 Compensation Coverage Waivers Act, stating that:

162 (A) the partnership, corporation, or sole proprietorship is customarily engaged in an
163 independently established trade, occupation, profession, or business; and

164 (B) the partner, corporate officer, or owner personally waives the partner's, corporate
165 officer's, or owner's entitlement to the benefits of this chapter and Chapter 3, Utah
166 Occupational Disease Act, in the operation of the partnership's, corporation's, or sole
167 proprietorship's enterprise under a contract of hire for services.

168 (f) (i) For purposes of this Subsection (7)(f), "eligible employer" means a person who:

169 (A) is an employer; and

170 (B) procures work to be done wholly or in part for the employer by a contractor,
171 including:

172 (I) all persons employed by the contractor;

173 (II) all subcontractors under the contractor; and

174 (III) all persons employed by any of these subcontractors.

175 (ii) Notwithstanding the other provisions in this Subsection (7), if the conditions of
176 Subsection (7)(f)(iii) are met, an eligible employer is considered an employer for purposes of
177 Section 34A-2-105 of the contractor, subcontractor, and all persons employed by the contractor
178 or subcontractor described in Subsection (7)(f)(i)(B).

179 (iii) Subsection (7)(f)(ii) applies if the eligible employer:

180 (A) under Subsection (7)(a) is liable for and pays workers' compensation benefits as an
181 original employer under Subsection (7)(a) because the contractor or subcontractor fails to
182 comply with Section 34A-2-201;

183 (B) (I) secures the payment of workers' compensation benefits for the contractor or
184 subcontractor pursuant to Section 34A-2-201;

185 (II) procures work to be done that is part or process of the trade or business of the
186 eligible employer; and

187 (III) does the following with regard to a written workplace accident and injury
188 reduction program that meets the requirements of Subsection 34A-2-111(3)(d):

189 (Aa) adopts the workplace accident and injury reduction program;

190 (Bb) posts the workplace accident and injury reduction program at the work site at
191 which the eligible employer procures work; and

192 (Cc) enforces the workplace accident and injury reduction program according to the
193 terms of the workplace accident and injury reduction program; or

194 (C) (I) obtains and relies on:

195 (Aa) a valid certification described in Subsection (7)(c)(i) or (7)(e)(i);

196 (Bb) a workers' compensation coverage waiver described in Subsection (7)(c)(ii) or
197 (7)(e)(ii); or

198 (Cc) proof that a director or officer is excluded from coverage under Subsection
199 34A-2-104(4);

200 (II) is liable under Subsection (7)(a) for the payment of workers' compensation benefits
201 if the contractor or subcontractor fails to comply with Section 34A-2-201;

202 (III) procures work to be done that is part or process in the trade or business of the
203 eligible employer; and

204 (IV) does the following with regard to a written workplace accident and injury
205 reduction program that meets the requirements of Subsection 34A-2-111(3)(d):

206 (Aa) adopts the workplace accident and injury reduction program;

207 (Bb) posts the workplace accident and injury reduction program at the work site at
208 which the eligible employer procures work; and

209 (Cc) enforces the workplace accident and injury reduction program according to the
210 terms of the workplace accident and injury reduction program.

211 (8) (a) For purposes of this Subsection (8), "unincorporated entity" means an entity
212 organized or doing business in the state that is not:

213 (i) an individual;

- 214 (ii) a corporation; or
- 215 (iii) publicly traded.

216 (b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
 217 unincorporated entity that is required to be licensed under Title 58, Chapter 55, Utah
 218 Construction Trades Licensing Act, is ~~considered~~ presumed to be the employer of each
 219 individual who holds, directly or indirectly, an ownership interest in the unincorporated entity.
 220 Notwithstanding Subsection (7)(c) and Subsection 34A-2-104(3), the unincorporated entity
 221 shall provide the individual who holds the ownership interest workers' compensation coverage
 222 under this chapter and Chapter 3, Utah Occupational Disease Act unless the presumption is
 223 rebutted under Subsection (8)(c).

224 (c) Pursuant to rules made by the commission in accordance with Title 63G, Chapter 3,
 225 Utah Administrative Rulemaking Act, an unincorporated entity may rebut the presumption
 226 under Subsection (8)(b) for an individual by establishing by clear and convincing evidence that
 227 the individual:

- 228 (i) is an active manager of the unincorporated entity;
- 229 (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated
 230 entity; or
- 231 (iii) is not subject to supervision or control in the performance of work by:
 232 (A) the unincorporated entity; or
 233 (B) a person with whom the unincorporated entity contracts.

- 234 (d) As part of the rules made under Subsection (8)(c), the commission may define:
 235 (i) "active manager";
 236 (ii) "directly or indirectly holds at least an 8% ownership interest"; and
 237 (iii) "subject to supervision or control in the performance of work."

238 Section 2. **Effective date.**

239 If approved by two-thirds of all the members elected to each house, this bill takes effect
 240 upon approval by the governor, or the day following the constitutional time limit of Utah
 241 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,
 242 the date of veto override.

243 Section 3. **Retrospective operation.**

244 This bill has retrospective operation to July 1, 2011.

Legislative Review Note
as of 9-27-11 3:39 PM

Office of Legislative Research and General Counsel